No. 87-1159

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Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1987

CNA FINANCIAL CORPORATION, CONTINENTAL ASSURANCE COMPANY, and CONTINENTAL CASUALTY COMPANY,

Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR and DIRECTOR OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF SEARS, ROEBUCK AND CO. IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE[1]

Sears, Roebuck and Co. ("Sears") files this brief amicus curiae to present its views regard-

1 This brief is filed with the written consent of all parties in accordance with Rule 36.1 of the Court.

ing a case which will significantly affect the administration of the Freedom of Information Act, 5 U.S.C. § 552 et seq. ("FOIA") and the rights of federal contractors who are required to submit confidential business data to the government pursuant to Executive Order 11246.

Sears is the largest retailer in the United States. As a government contractor, Sears, like petitioner CNA, is required to comply with Executive Order 11246. The regulations promulgated thereunder require Sears to submit equal employment opportunity (commonly known as "EEO-1") reports, as well as maintain and provide on request, written affirmative action programs for each of its facilities nationwide. This information can significantly aid its competitors in gauging Sears' business plans, including its entry into or withdrawal from markets. Sears, therefore, has a substantial interest in the procedural rights accorded to submitters of confidential business data to the

government when public disclosure of such valuable property is sought under the FOIA.

Sears' interest in the resolution of the legal issues raised by petitioner is underscored by its own participation[2] as a party to three reverse-FOIA actions presenting exactly the same issues. Sears, Roebuck and Co. v. General Services Administration, et al., Case No. 2149-73 (D.D.C.), pending since 1973, was filed when the General Services Administration decided to release, over Sears' objections, EEO-1 reports and affirmative action plans for nineteen major Sears retail units, its New York buying offices, and Sears' corporate headquarters. Sears, Roebuck and Co. v. Jack Eckerd, et al., Case No. 76 C 2444 (N.D. Ill.), pending

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2 The data Sears provides to the government includes detailed narrative and statistical information regarding staffing, pay scales, and changes in employment at each unit. The data also includes information concerning the number of present employees and future goals and timetables that have been established to increase the number of females and minorities in Sears' workforce.

since 1976, was filed when the Office of Federal Contract Compliance Programs ("OFCCP") decided to release, over Sears' objections, affirmative action plans and EEO-1 reports covering Sears' corporate headquarters. Agnes Gioconda, et al. v. Jack Eckerd, et al., Case No. 76 C 4499 (N.D. Ill), a case in which Sears was given leave to intervene and which was consolidated with Sears v. Eckerd, was filed in 1976 to obtain disclosure of certain Sears EEO-1 reports and affirmative action plans. Because Sears and the government have expected the instant case to provide needed guidance on the procedural and substantive issues presented, each of the Sears cases has been held in abeyance at the district court or agency level awaiting resolution of the instant case.

The interest of Sears, therefore, in filing this brief amicus curiae urging that the petition for writ of certiorari be granted, is based on the substantial and far reaching consequences

that the resolution of the instant case will have on Sears and American business in general.

REASONS FOR GRANTING THE WRIT

1. The Court's decision in Chrysler Corporation v. Brown, 441 U.S. 281 (1979), was a milestone in reverse-FOIA law because it identified the form of action to be utilized by submitters of information who, like Sears, seek to protect their valuable business data from public disclosure. However, as CNA demonstrated in its Petition, Chrysler's failure to answer other critical questions has left both businesses that submit data to the government and government agencies who are called on to respond to FOIA disclosure requests without needed guidance as to what substantive standards and procedural protections are to be applied in the reverse-FOIA context. Businesses and agencies do not know whether they are receiving or according sufficient due process to submitters at the agency level. Nor do they know whether agency

action will or should be reviewed by the courts on a de novo basis. In addition, enormous uncertainty exists among large and small businesses as to the relative scope of FOIA Exceptions 3 and 4 (5 U.S.C. § 552(b)(3) and (4)) and the Trade Secrets Act, 18 U.S.C. § 1905.

Review is warranted by this Court because, as discussed at pages 3-4, supra, since 1981, for both submitters and the government, this case served as the vehicle for resolving the key reverse-FOIA issues left open in Chrysler. As CNA aptly stresses in its Petition, Sears and other employers have waited nearly six years for a decision in the instant case. During that period, the development of reverse-FOIA law has been frozen. Cases that would normally have percolated up to the courts of appeals and this Court have not done so because, like Sears' cases, they have been effectively stayed pending resolution of the present case. This case presents all of the fundamental issues that employers, agencies and the lower courts have

struggled with since Chrysler. Resolution of the issues raised by this case will, therefore, provide a needed vehicle for providing long overdue guidance on those issues. The petition, therefore, should be granted.

2. The court of appeals' conclusion in this case and in National Organization for Women v. Social Security Administration ("NOW"), 736 F.2d 727, 745 (D.C. Cir. 1984), that de novo review of agency action in a reverse-FOIA case is available only when agency procedures are "severely defective" will, in effect, preclude all judicial review of agency decisions to disclose confidential business data. Coupled with its finding that the astoundingly meager process accorded CNA in this case was not "severely defective," it is unrealistic to view the court of appeals' decision as anything but the elimination of de novo judicial review in a reverse-FOIA case.

The OFCCP and agencies like it have no expertise by which to measure the substantiality

of the competitive harm to result from "public" disclosure of business plans formulated after the enormous expenditure of time and money.[3] Submitters know this, requesters know this, and the agencies know this. In the instant case, the OFCCP had to purchase its expertise from outside. In NOW, however, there was no inside or outside agency expertise, but de novo review was still rejected. The concern of Sears, and the business community at large, is that, absent review by this Court, valuable property will be disposed of through uninformed agency decisions subject to reversal only where a blatant abuse of discretion is shown.

Sears, as well as other businesses, are already under tremendous competitive pressure from foreign competition who have entered their markets. American businesses need more, not less, protection of their confidential business

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3 As the Petition poignantly states (Petition, p. 12 and n. 19), in the business context, the public's "right to know" under the FOIA is, in fact, becoming the competitor's right to surveil.

data from competitors. Government agencies, as exemplified by the OFCCP's action in the CNA case, have, with no expertise, blithely ignored the competitive harm that is likely to be engendered from public disclosure.

3. The relative scope of the Trade Secrets Act, 18 U.S.C. § 1905 and FOIA Exemption 4 is an important issue that has waited too long for resolution after Chrysler. The plain language of § 1905 makes it a crime for a federal employee to release the kind of commercially valuable information which, according to the court of appeals, should be handed over to anyone who writes a request letter to the OFCCP. If, as this Court implied in dictum in Chrysler (441 U.S. at 319 n. 49), the scope of Exemption 4 and § 1905 is the same, then there is no room for release of CNA's or Sears' or any business' confidential data under the FOIA. As CNA's petition underscores (Petition, pp. 12-14), the "substantial competitive harm" test of National Parks and Conservation Association v.

Morton ("National Parks I"), 498 F.2d 765 (D.C. Cir. 1974) does not adequately define the relative scope of Exemption 4 and § 1905, and is, in fact, inconsistent with Chrysler's indication that their scope is the same.

4. CNA's observation that "[t]he procedures applied by the OFCCP are of importance to every government contractor and subcontractor" (Petition, p. 14), is an understatement. The release of the information at issue in this case, in Sears' cases, and in cases involving other government contractors would be the taking away of valuable property without due process. CNA was not given any notice of the issues the OFCCP was to consider. CNA was denied access to the evidence upon which the OFCCP relied. If the decision below is permitted to stand, the same result awaits Sears and other employers. That result simply cannot be squared with the most fundamental due process requirements—notice of the issues and an opportunity to confront the evidence.

No one loses anything if the person whose property is at issue is told what factors the decisionmaker is going to consider. No one loses anything when the parties are permitted to see and respond to the evidence that the decisionmaker is going to review. On the contrary, everyone gains when these basic precepts of due process are accorded.

CONCLUSION

For the reasons stated herein, Sears urges this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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